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7 UNITED STATES DISTRICT COURT
8 DISTRICT OF OREGON
9 PORTLAND DIVISION
10

11 **ELLISLAB, INC.**, an Oregon
12 Corporation,

No. 3:12-cv-00432-HU

13 Plaintiff,

**FINDINGS AND
RECOMMENDATION**

14 v.

15 **GIPPY'S INTERNET SOLUTIONS, LLC**,
16 a Minnesota limited liability
company,

17 Defendant.
18

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1 HUBEL, J.,

2 In this Lanham Act case, defendant Gippy's Internet Solutions,
3 LLC ("Defendant") moves to dismiss for lack of personal
4 jurisdiction pursuant to Federal Rule of Civil Procedure ("Rule")
5 12(b)(2) or, alternatively, for a convenience venue transfer to the
6 District of Minnesota. For the following reasons, Defendant's
7 motion (Docket No. 7) should be DENIED in its entirety.

8 **I. BACKGROUND¹**

9 Plaintiff is an Oregon corporation with its principal place of
10 business in Beaverton, Oregon. (Am. Compl. ¶ 1.) Plaintiff
11 develops software and services that enable consumers to maintain
12 their website content without the need for technical expertise.
13 (Am. Compl. ¶¶ 1,7.) Defendant is a Minnesota limited liability
14 company with its principal place of business in Minneapolis,
15 Minnesota. (Am. Compl. ¶ 2.) Defendant is a provider of business-
16 focused web hosting services. (Am. Compl. ¶ 7; Def.'s Mem. Supp.
17 at 7.) A web hosting service allows individuals and/or businesses
18 to make their website accessible via the Internet by storing the
19 website on the host's server and connecting that website to the
20 Internet. (Ellis Decl. ¶ 3.)

21 In 2002, Plaintiff released the first version of its website
22 publishing software, "pMachine." (Am. Compl. ¶ 7.) That same
23 year, Plaintiff entered into an agreement with Defendant, wherein
24 Plaintiff validly licensed its marks to Defendant and provided a
25

26
27 ¹ The facts recited in this Findings and Recommendations are
28 for the purpose of resolving of this motion and are not to be
construed as findings of fact that the parties may rely on in
future proceedings in this case.

1 link for customers from Plaintiff's website (where users could
2 purchase Plaintiff's web publishing software) to a web portal
3 called www.pmachinehosting.com ("the pMachine website" or "the web
4 portal").² (Am. Compl. ¶ 16.) Plaintiff's founder, Rick Ellis
5 ("Ellis"), created the pMachine website in California and launched
6 it while living and working in Oregon.³ (Ellis Decl. ¶ 3.)

7 At the pMachine website, customers could purchase Defendant's
8 web hosting services tailored to work with Plaintiff's web
9 publishing software, as well as packages that bundled together both
10 Plaintiff's software and Defendant's web hosting services. (Am.
11 Compl. ¶ 16.) The parties agreed that in exchange for the license
12 to use Plaintiff's marks and the ability to serve customers
13 originating from Plaintiff's website, the parties would share the
14 revenues generated by the pMachine website. (Am. Compl. ¶ 18.) It
15 was also understood that Defendant would handle all day-to-day
16 operations of the site. (Ellis Decl. ¶ 3.)

17 In August of 2006, Defendant's founder, Nevin Lyne ("Lyne"),
18 traveled to Ellis' home in Bend, Oregon for a business meeting.
19 (Ellis Decl. ¶ 5.) During that meeting, Ellis and Lyne entered
20 into a second oral agreement regarding the rebranding of Ellis'
21 company and decided to change the name of the web portal from
22

23 ² Plaintiff owns, among other things, the pMachine trademark
24 for content management software. (Am. Compl. ¶ 8.)

25 ³ It is not uncommon for business entities to engage in
26 revenue sharing in areas as diverse as web portals. See generally
27 *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d
28 1019, 1055 (9th Cir. 2010) (citing an article which discussed
several newspapers that linked up with Yahoo! and agreed to turn
over half of the revenue from ads the newspapers sold on the web
portal).

1 www.pmachinehosting.com to www.enginehosting.com ("the Engine
2 website"). (Ellis Decl. ¶ 5.) Plaintiff completed the web
3 portal's name change in 2007 and Defendant continued to handle all
4 day-to-day operations of the site. (Ellis Decl. ¶ 6.)

5 In February of 2012, Plaintiff learned that Defendant had been
6 secretly underpaying them its share of the revenue generated by the
7 website. (Am. Compl. ¶ 25.) Apparently, Defendant had been
8 shifting customers to certain custom hosting packages which
9 Defendant unilaterally determined were outside the scope of the
10 parties' agreement. (Am. Compl. ¶ 27.) Defendant also filed
11 trademark applications for the names "EngineHosting and "Engine
12 Hosting Powering the Dynamic Web!" without informing Plaintiff.
13 (Am. Compl. ¶ 28.)

14 Plaintiff filed this lawsuit a month later in March of 2012.
15 On April 23, 2012, Plaintiff filed an amended complaint against
16 Defendant, asserting claims of (1) false designation of origin and
17 unfair competition under Section 43(a) of the Lanham Act, 15 U.S.C.
18 § 1125(a); (2) trademark infringement under §§ 1114(1)(a) and
19 1116(d); (3) false advertisement and unfair competition under §
20 1125(a); and (4) breach of contract. Defendant's motion to dismiss
21 or, alternatively, to transfer venue followed on May 2, 2012.

22 **II. LEGAL STANDARD**

23 **A. Personal Jurisdiction**

24 In opposition to a defendant's motion to dismiss for lack of
25 personal jurisdiction, the plaintiff bears the burden of
26 establishing that jurisdiction is proper." *Boschetto v. Hansing*,
27 539 F.3d 1011, 1015 (9th Cir. 2008) (citing *Sher v. Johnson*, 911
28 F.2d 1357, 1361 (9th Cir. 1990)). When the district court decides

1 the motion without an evidentiary hearing, as is the case here,
2 then "the plaintiff need only make a prima facie showing of the
3 jurisdictional facts." *Id.* The court's sole inquiry is whether
4 the plaintiff's pleadings and affidavits make a prima facie showing
5 of personal jurisdiction. *Id.* (citing *Caruth v. Int'l*
6 *Psychoanalytical Ass'n*, 59 F.3d 126, 127-28 (9th Cir. 1995)). The
7 court is required to take as true any uncontroverted allegations in
8 the plaintiff's complaint. *Id.* (citation omitted). If there are
9 any conflicts between the parties over statements contained in
10 affidavits, then the court must resolve the conflicts in the
11 plaintiff's favor. *Id.* (citing *Schwarzenegger v. Fred Martin Motor*
12 *Co.*, 374 F.3d 797, 800 (9th Cir. 2004)).

13 In diversity cases, the court is instructed to look to the law
14 of the state in which it resides to determine whether personal
15 jurisdiction over the non-resident exists. *W. Helicopters, Inc. v.*
16 *Rogerson Aircraft Corp.*, 715 F. Supp. 1486, 1489 (D. Or. 1989)
17 (citing *Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1246 (9th Cir.
18 1984)). In Oregon, the long-arm statute, ORCP 4L, creates a
19 standard that is co-extensive with federal jurisdictional
20 standards, thereby permitting a federal court sitting in the
21 District of Oregon to exercise personal jurisdiction so long as
22 within the limits of federal constitutional due process. *Gray &*
23 *Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 760 (9th Cir. 1990)
24 (citing ORCP 4L; *Or. ex rel. Hydraulic Servocontrols Corp. v. Dale*,
25 294 Or. 381, 657 P.2d 211, 212 (1982)).

26 Constitutional due process requires that a defendant have
27 certain minimum contacts with the forum state such that the
28 maintenance of the suit does not offend "traditional notions of

1 fair play and substantial justice." *Int'l Shoe Co. v. State of*
 2 *Wash.*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311
 3 U.S. 457)). The pertinent determination for the court is whether
 4 the "defendant's conduct and connection with the forum [s]tate are
 5 such that he should reasonably anticipate being haled into court
 6 there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297
 7 (1980).

8 **B. Motion to Transfer Venue**

9 Section 1404(a) provides: "For the convenience of the parties
 10 and witnesses, in the interest of justice, a district court may
 11 transfer any civil action to any other district or division where
 12 it might have been brought." 28 U.S.C. 1404(a) (2006). Generally,
 13 a plaintiff's choice of forum is given "great weight," *Lou v.*
 14 *Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987), and defendants "must
 15 make a strong showing of inconvenience to warrant upsetting the
 16 plaintiff's choice of forum." *Decker Coal Co. v. Commonwealth*
 17 *Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). But § 1404(a)
 18 ultimately places discretion in the district court to evaluate
 19 convenience transfers on a case-by-case basis for convenience and
 20 fairness. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 23
 21 (1988).

22 **III. DISCUSSION**

23 **A. Defendant's Rule 12(b)(2) Motion to Dismiss**

24 Generally, there are two types of personal jurisdiction that
 25 a court may have over a defendant, general and specific. A
 26 defendant can be subject to general jurisdiction if they have
 27 continuous and systematic contacts with the forum state. *Reebok*
 28 *Intern. Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995). If

1 general jurisdiction is inapplicable, the court must then determine
2 whether specific jurisdiction exists. *In re Tuli*, 172 F.3d 707,
3 713 n.5 (9th Cir 1999). I will proceed first to the general
4 jurisdiction analysis.

5 **1. General Jurisdiction**

6 Defendant argues that the nature and extent of their contacts
7 with Oregon are insufficient to subject it to general jurisdiction.
8 For general jurisdiction to exist, "the defendant must engage in
9 continuous and systematic general business contacts . . . that
10 approximate physical presence in the forum state." *Schwarzenegger*,
11 374 F.3d at 801 (internal quotation marks and citations omitted).
12 The Ninth Circuit has set a high standard for general jurisdiction,
13 *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1169 (9th Cir.
14 2006), because such a finding "permits a defendant to be haled into
15 court in the forum state to answer for any of its activities
16 anywhere in the world." *Schwarzenegger*, 374 F.3d at 801. Factors
17 to be taken into consideration include whether the nonresident
18 defendant "makes sales, solicits or engages in business in the
19 state, serves the state's markets, designates an agent for service
20 of process, holds a license, or is incorporated there." *Bancroft*
21 *& Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th
22 Cir. 2000), overruled on other grounds by *Yahoo! Inc. v. La Ligue*
23 *Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006)
24 (en banc).

25 Defendant submits Lyne's declaration as evidence that there is
26 no basis for general jurisdiction here. Lyne's declaration
27 provides, in pertinent part, that:

1 • "[T]here have been between 90 and 110 clients that have signed
2 up from the state of Oregon in the 10 years since [Defendant]
3 began working with [Plaintiff]."

4 • "Clients in Oregon have, over the last 10 years, represented
5 about 1.5% of [Defendant]'s hosting clients."

6 • Defendant "has never had a major (high priced) client from
7 Oregon, and virtually all of the Oregon clients have been in
8 the \$10 to \$20 per month range."

9 • "I believe that [Defendant]'s overall revenue from Oregon-
10 based clients is a fraction of a percent of [Defendant]'s
11 overall revenues."

12 • Defendant "has never made any specific effort to go after
13 businesses in Oregon for web hosting services."

14 • Defendant "has never been registered or licensed to do
15 business in Oregon. [Defendant] has never paid any taxes to
16 Oregon. [Defendant] does not now and has never had a bank
17 account in Oregon."

18 • Defendant "has never targeted any print, television, or radio
19 advertising toward Oregon."

20 (Lyne Decl. ¶¶ 15, 17, 19-23.)

21 In response, Plaintiff points out that Defendant (1) conducted
22 business with Oregon customers via its interactive website; (2)
23 maintained "traditional business contacts" (primarily in the form
24 of email communication after customers sign up for services through
25 Defendant's website); (3) conducted business with an Oregon
26 corporation (Plaintiff); (4) sent commission payments to Oregon,
27 either to Ellis or wired directly to Plaintiff's Oregon bank
28 account; and (5) traveled to Oregon to conduct business with

1 Plaintiff (i.e., the August 2006 meeting at Ellis' home in Bend,
2 Oregon).

3 Defendant's contacts fall well short of the requisite showing
4 for general jurisdiction. "A court may assert general jurisdiction
5 over foreign (sister-state or foreign-country) corporations to hear
6 any and all claims against them when their affiliations with the
7 State are so 'continuous and systematic' as to render them
8 essentially at home in the forum State." *Goodyear Dunlop Tires*
9 *Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). That is
10 not what we have here.

11 Two examples suffice to illustrate this point. In *Perkins v.*
12 *Benquet Consol. Mining Co.*, 342 U.S. 437 (1952), which was recently
13 described by Supreme Court as the "textbook case of general
14 jurisdiction appropriately exercised," *Goodyear*, 131 S. Ct. at 2856
15 (citation and internal quotation marks omitted), the defendant was
16 a Philippine corporation whose mining operations were halted while
17 the Japanese occupied the Philippines during World War II.
18 *Perkins*, 342 U.S. at 447. As a result, the president, who was also
19 the general manager and principal stockholder of the company,
20 returned to his home in Ohio, where he ran a corporate office. *Id.*
21 The president "did many things on behalf of the company" in Ohio.
22 *Id.* at 448. He kept business files there; handled corporate
23 correspondence; drew employee's salaries from accounts in Ohio
24 banks that carried substantial balances of company funds; held
25 director meetings; and supervised policies dealing with the
26 rehabilitation of the corporation's properties in the Philippines.
27 *Id.*

1 By contrast, in *Mavrix Photo, Inc. v. Brand Technologies,*
2 *Inc.*, 647 F.3d 1218 (9th Cir. 2011), it was argued that Brand, an
3 Ohio corporation that operated an interactive website called
4 celebrity-gossip.net, was subject to general jurisdiction in
5 California. *Id.* at 1222. Brand and its website had several
6 specific ties to California, including (1) Brand made money from
7 third-party advertisements for jobs, hotels, and vacations in
8 California; (2) the website featured a "Ticket Center," which
9 enabled third-party vendors to sell tickets to events in
10 California; (3) Brand had several agreements with California
11 businesses; (4) a California Internet advertising agency solicited
12 buyers and placed advertisements on the website; (5) a California
13 wireless phone service provider designed and hosted on its servers
14 a version of the website that was accessible to cell phone users;
15 (6) a California firm designed the website and performed site
16 maintenance; and (7) Brand entered a "link-sharing" agreement with
17 a California-based national new site, according to which each site
18 agreed to promote the other's top stories. *Id.* The Ninth Circuit
19 held that Brand's contacts fell "well short of the requisite
20 showing for general jurisdiction" and "reiterate[d] that Brand
21 ha[d] no offices or staff in California, [was] not registered to do
22 business in the state, ha[d] no registered agent for service of
23 process, and pa[id] no state taxes." *Id.* at 1225. The level of
24 activity rejected in *Mavrix* as insufficient to make out a case for
25 general jurisdiction is greater than exists on the record before
26 this court.

27 In this case, as in *Mavrix*, Defendant's contacts with Oregon
28 are not so "continuous and systematic" as to render them

1 essentially at home in this state. Defendant does not have an
2 office or staff in Oregon, is not registered to do business in the
3 state, has no registered agent for service of process in Oregon,
4 and does not pay Oregon state taxes. Plaintiff makes much of the
5 fact that "[t]hrough [Defendant]'s interactive website a visitor
6 can become a customer of [Defendant]'s in just a few
7 'clicks,' . . . without ever leaving his or her chair in Oregon."
8 (Pl.'s Mem. Opp'n at 7.) As the Ninth Circuit has observed,
9 rejecting an argument similar to the one raised by Plaintiff, "the
10 level of interactivity of a nonresident defendant's website
11 provides limited help in answering the distinct question whether
12 the defendant's forum contacts are sufficiently substantial,
13 continuous, and systematic to justify general jurisdiction."
14 *Mavrix*, 647 F.3d at 1227 (citations omitted). Accordingly,
15 Defendant's contacts with Oregon, even considered collectively, do
16 not justify the exercise of general jurisdiction.

17 **2. Specific Jurisdiction**

18 In the alternative, Plaintiffs argues that Defendant has
19 sufficient minimum contacts with Oregon to justify the exercise of
20 specific jurisdiction. Courts in the Ninth Circuit analyze
21 specific jurisdiction under a three-prong test:

22 (1) The non-resident defendant must purposefully direct
23 his activities or consummate some transaction with the
24 forum or resident thereof; or perform some act by which
25 he purposefully avails himself of the privilege of
conducting activities in the forum, thereby invoking the
benefits and protections of its laws;

26 (2) the claim must be one which arises out of or relates
to the defendant's forum-related activities; and

27 (3) the exercise of jurisdiction must comport with fair
28 play and substantial justice, i.e. it must be reasonable.

1 *Schwarzenegger*, 374 F.3d at 802 (quoting *Lake v. Lake*, 817 F.2d
2 1416, 1421 (9th Cir. 1987)). Plaintiff bears the burden on the
3 first two parts of the test and, if this burden is met, Defendant
4 must come forward with a compelling case why the exercise of
5 jurisdiction would not be reasonable. *Boschetto*, 539 F.3d at 1016.

6 The first prong of the specific jurisdiction test refers to
7 both purposeful direction and purposeful availment. A purposeful
8 availment analysis is most often used in suits sounding in
9 contract, while a purposeful direction analysis is used in suits
10 sounding in tort. *Schwarzenegger*, 374 F.3d at 802. Although
11 Plaintiff has brought both contract and tort claims here, I find
12 the purposeful availment analysis dispositive. See *Brayton Purcell*
13 *LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)
14 ("The first prong is satisfied by either purposeful availment or
15 purposeful direction[.]")

16 In *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191 (9th Cir.
17 1988), the Ninth Circuit observed that: "In order to have
18 purposefully availed oneself of conducting activities in the forum,
19 the defendant must have performed some type of affirmative conduct
20 which allows or promotes the transaction of business within the
21 forum state." *Id.* at 1195. For example, "the solicitation of
22 business in the forum state that results in business being
23 transacted or contract negotiations will probably be considered
24 purposeful availment." *Id.*; *Peterson v. Highland Music, Inc.*, 140
25 F.3d 1313, 1320 (9th Cir. 1988) ("Contract negotiations are classic
26 examples of the sort of contact that can give rise to *in personam*
27 jurisdiction[.]"); *Decker*, 805 F.2d at 840 ("[C]onducting contract
28 negotiations in the forum state will probably qualify as an

1 invocation of the forum law's benefits and protections.") And
2 "[i]n return for these benefits and protections, a defendant must-
3 as a quid pro quo- submit to the burdens of litigation in that
4 forum." *Schwarzenegger*, 374 F.3d at 802 (internal quotation marks
5 and citation omitted).

6 In this case, Defendant has purposefully availed itself of the
7 privilege of doing business in Oregon. In July of 2006, Ellis sent
8 Lyne an email indicating that there were some issues that the
9 parties had "never discussed," including, but not limited to: (1)
10 "What happens if one or the other party decides to walk away?"; (2)
11 "Who holds claim to the name pMachine Hosting?"; (3) "What clients
12 are exempt from our commission?"; (4) "What expenses are shared and
13 which are not?"; and (5) "Does pMachine, Inc. get paid a percentage
14 of the full purchase amount made by the client, or is it amortized
15 monthly based on the hosting plan[?]" (Ellis Decl. Ex. 1 at 2-3.)
16 In August of 2006, at his own suggestion, Lyne traveled to Ellis'
17 home in Bend, Oregon and the parties "entered into a second oral
18 agreement regarding the rebranding of [Ellis'] company" and decided
19 to change "the portal website from 'pMachineHosting.com' to
20 'EngineHosting.com.'" (Ellis Decl. ¶ 5.) Lyne also sent Ellis an
21 email on March 15, 2007, seeking to renegotiate Defendant's
22 commission. (Ellis Decl. ¶ 7.) In the March 2007 email, Lyne's
23 terms were preceded by the phrase "[s]o here is what I would like
24 to offer and see if its something you could deal with." (Ellis
25 Decl. Ex. 2 at 2.) Those terms were accepted by Ellis while he was
26 still living and working in Oregon. (Ellis Decl. ¶ 7.)
27 Accordingly, I find that Defendant purposefully availed itself of
28 the laws and benefits of Oregon.

1 With respect to the second prong, the Ninth Circuit has
2 adopted a "but for" test in determining whether a claim arises from
3 the defendant's forum related activities. *Mattel, Inc. v. Greiner*
4 & *Hauser GMBH*, 354 F.3d 857, 864 (9th Cir. 2003). The question can
5 be formulated as this: But for Defendant's contacts with Oregon,
6 would Plaintiff's claims against Defendant have arisen? I answer
7 that question in the affirmative. Plaintiff's breach of contract
8 claim is based on the parties' agreement regarding "the revenues
9 generated by *www.pmachinehosting.com* and *www.engagehosting.com*,"
10 (Am. Compl. ¶ 53), which is directly related to Defendant's forum
11 related activities. *Cf. Decker*, 805 F.2d at 840 (determining that
12 a claim arose out of forum-related activities based on the
13 disruption of the plaintiff's contractual expectations).

14 With respect to the third prong, seven factors are considered
15 in determining whether the exercise of jurisdiction must comport
16 with fair play and substantial justice:

17 (1) the extent of the defendants' purposeful injection
18 into the forum state's affairs; (2) the burden on the
19 defendant of defending in the forum; (3) the extent of
20 the conflict with the sovereignty of the defendant's
21 state; (4) the forum state's interest in adjudicating the
22 dispute; (5) the most efficient judicial resolution of
23 the controversy; (6) the importance of the forum to the
24 plaintiff's interest in convenient and effective relief;
25 and (7) the existence of an alternative forum.

26 *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1080 (9th
27 Cir. 2011) (citation omitted).

28 After reviewing the pleadings, I conclude that Defendant has
failed to present a compelling case that this Court's exercise of
personal jurisdiction over it is unreasonable. In coming to this
conclusion, I am most persuaded by factors one, two, four, and

six.⁴ The first factor weighs in favor of Plaintiff because, as discussed above, Defendant has purposely injected itself into Oregon's affairs. Defendant had up to 110 web hosting customers from Oregon over the last ten years and entered into a revenue-sharing agreement with an Oregon company. Under the second factor, I find the burden on Defendant in having to defend this lawsuit in Oregon is minimal. See *CollegeSource*, 653 F.3d at 1080 ("[W]ith the advances in transportation and telecommunications and the increasing interstate practice of law, any burden [of litigation in a forum other than one's residence] is substantially less than in days past.") Lyne was more than willing to travel to Oregon to conduct contract negotiations and what resulted from those negotiations is relevant to this litigation. The fourth factor also favors Plaintiff because Oregon has a substantial interest in adjudicating disputes involving Oregon corporations. *Nike, Inc. v. Lombardi*, 732 F. Supp. 2d 1146, 1156 (D. Or. 2010). Lastly, although the sixth factor is not of paramount importance, *id.*, Defendant concedes that it "obviously" is in Plaintiff's favor. (Def.'s Mem. Supp. at 21.)

In sum, I conclude that Plaintiff has presented a prima facie case of purposeful availment by Defendant sufficient to survive a motion to dismiss for lack of personal jurisdiction.

B. Transfer of Venue Under § 1404(a)

Next, Defendant argues that transfer of this matter to the District of Minnesota for consolidation with Defendant's pending declaratory judgment action filed there. In determining whether a

⁴ Both parties concede that the third factor is neutral.

1 transfer of venue under § 1404(a) is appropriate, courts consider
2 the following factors:

3 (1) the location where the relevant agreements were
4 negotiated and executed, (2) the state that is most
5 familiar with the governing law, (3) the plaintiff's
6 choice of forum, (4) the respective parties' contacts
7 with the forum, (5) the contacts relating to the
8 plaintiff's cause of action in the chosen forum, (6) the
9 differences in the costs of litigation in the two forums,
10 (7) the availability of compulsory process to compel
11 attendance of unwilling non-party witnesses, and (8) the
12 ease of access to sources of proof.

13 *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir.
14 2000). The burden is on the plaintiff to show that the case is
15 filed in the proper venue. *Piedmont Label Co. v. Sun Garden*
16 *Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979).

17 I conclude that this case should not be transferred to the
18 District of Minnesota. To begin, I note that Plaintiff's choice of
19 forum is given great weight and a transfer must do more than merely
20 shift convenience. *Lombardi*, 732 F. Supp. 2d at 1158; *Gulf Oil Corp*
21 *v. Gilbert*, 330 U.S. 501, 508 (1947) ("[U]nless the balance is
22 strongly in favor of the defendant, the plaintiff's choice of forum
23 should rarely be disturbed.") Such considerations are particularly
24 appropriate here because Plaintiff filed this action in April 2012,
25 one month before Defendant filed a complaint seek declaratory
26 relief in the District of Minnesota. According to Plaintiff's
27 counsel, the case filed in Minnesota "involves the same parties and
28 the same issues while only seeking declaratory relief." (Pl.'s
Mem. Opp'n at 22.)

29 The district court was confronted with a similar issue in
30 *Klein v. Garnder*, No. C 06-06918, 2007 WL 128228 (N.D. Cal. 2007).
31 The plaintiff in *Klein* filed a lawsuit in California federal court

one month after the defendants had filed a lawsuit in Oregon. *Id.* at *1. Soon thereafter, the defendants moved to dismiss or transfer the case. *Id.* In granting the defendant's motion to transfer to this district, *Klein* stated:

[T]he Court concludes that . . . factors [set forth in *GNC Franchising*] weigh in favor of transfer. . . . Mo[st] importantly, Defendants presented substantially the same controversy to the Oregon courts first. This case was obviously brought in reaction to the filing of the lawsuit in Oregon. Where, as here, a reactive lawsuit presents substantially the same controversy as the previously filed case, the first-to-file rule demands that the case be litigated in Oregon, not California. The Court acknowledges that several witnesses and many of the business records relevant to the lawsuit are situated in California. Nonetheless, the Court does not consider these inconveniences so serious as to trump the first-to-file rule[.]

Id. at *4.

In short, *Klein's* guidance convinces me that the first-to-file rule demands that this case be litigated in Oregon as well.

IV. CONCLUSION

Based on the foregoing reasons, Defendant's motion (Docket No. 7) should be DENIED in its entirety.

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///

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V. SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due **October 8, 2012**. If no objections are filed, then the Findings and Recommendation will go under advisement on that date. If objections are filed, then a response is due **October 25, 2012**. When the response is due or

1 filed, whichever date is earlier, the Findings and Recommendation
2 will go under advisement.

3 Dated this 18th day of September, 2012.

4
5 /s/ Dennis J. Hubel

6
7

DENNIS J. HUBEL
United States Magistrate Judge